Supreme Court, U. S.
FILED
DEC 29 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-415

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal from the Supreme Court for the State of Illinois

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

DONALD M. RENO, JR. and
J. STEVEN BECKETT

RENO, O'BYRNE & KEPLEY

501 West Church
Champaign, Illinois 61820

Attorneys for Appellant.

COCKLE PRINTING CO., 1622 ST. MARY'S AVE., OMAHA

INDEX

Subject Index

	Pages
Statement of the Case	2
Argument	2
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases

Central Magazine Sales, Ltd. v. United States, 389 U. S. 50 (1967) 3

Chicago v. Universal Pub. & Dist. Corp., 34 Ill. 2d 250, 215 N. E. 2d 251 (1966) 3, 4

City of Blue Island v. DeVilbiss, 41 Ill. 2d 135, 242 N. E. 2d 761 (1968) 3, 4

City of Chicago v. Geraci, 46 Ill. 2d 576, 264 N. E. 2d 153 (1970) 3, 4

Eagle Books, Inc. v. Reinhard, 418 F. Supp. 345 (1976) 5, 6, 7

Felton v. City of Pensacola, 390 U. S. 340 (1968) 3

Jacobellis v. Ohio, 378 U. S. 184 (1966) 3

Manual Enterprises, Inc. v. Day, 370 U. S. 478 (1962) 3

Miller v. California, 413 U. S. 15 (1973) 2, 4, 5, 7

People v. Gould, 60 Ill. 2d 159, 324 N. E. 2d 412 (1975) 4

People v. Ridens (Ridens I), 51 Ill. 2d 410, 282 N. E. 2d 691 (1972) 3

Cases—Continued

	Pages
People v. Ridens (Ridens II), 59 Ill. 2d 362, 321 N. E. 2d 264 (1974)	2, 3, 4, 5
People v. Sikorn, 32 Ill. 2d 260, 204 N. E. 2d 768 (1965)	3
People v. Ward, 63 Ill. 2d 437, 349 N. E. 2d 47 (1976)	2, 6, 7
Potomac News Co. v. United States, 389 U. S. 47 (1967)	3
Redrup v. New York, 386 U. S. 767 (1967)	3
Rosenbloom v. Virginia, 388 U. S. 450 (1967)	3
State v. Harding, 114 N. H. 335, 320 A. 2d 646 (1974)	7
Sunshine Book Co. v. Summerfield, 355 U. S. 372 (1958)	3

Statutes

Illinois Revised Statutes, Chapter 38, § 11-20	2

In The

Supreme Court of the United States

October Term, 1976

No. 76-415

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal from the Supreme Court for the State of Illinois

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellant submits this brief in opposition to the statement and argument of the State of Illinois presented in appellee's Motion to Dismiss or Affirm.

STATEMENT OF THE CASE

The facts of this case, together with the opinion of the Illinois Supreme Court are set forth in appellant's Jurisdictional Statement.

———o———

ARGUMENT

The Illinois Supreme Court refused to accept the argument that Illinois decisions prior to Miller v. California had provided the constitutionally mandated authoritative construction.

The first argument of the State of Illinois is not a new one. Simply stated, it is that prior decisions of Illinois courts supply the clarifying gloss required by *Miller v. California*, 413 U. S. 15 (1973). The identical argument was made before the Illinois Supreme Court in *People v. Ridens*, 59 Ill. 2d 362, 321 N. E. 2d 264 (1974), (hereinafter referred to as *Ridens II*) and was acknowledged by that Court in its opinion, *Ridens II*, 59 Ill. 2d at 366, 321 N. E. 2d at 266. The Illinois Supreme Court did not accept this argument in *Ridens II*, instead the court elected to construe the Illinois Obscenity Statute, Chapter 38, § 11-20. The court held that it accepted parts (a) and (b) of the *Miller* tripartite test, and that the Illinois Obscenity Statute as written met those standards. *Ridens II*, 59 Ill. 2d at 373, 321 N. E. 2d at 270. This construction was restated in the opinion of the Illinois Supreme Court in appellant's case, *People v. Ward*, 63 Ill. 2d 437, 441, 349

N. E. 2d 47, 49 (1976), and is an important ingredient in the constitutional issue raised in this case. The Attorney General's argument, in fact, was explicitly rejected by Justice Davis in his dissent in *Ridens II*, 59 Ill. 2d 362, 378, 321 N. E. 2d 264, 272 (1974).

Appellee's argument is further weakened by an analysis of the cases cited therein. The opinions in those cases clearly demonstrate that no construction is being placed on any statute, rather in keeping with the independent judicial review required by *Jacobellis v. Ohio*, 378 U. S. 184 (1966), the Illinois Supreme Court was summarizing and reviewing the content of various publications on an ad hoc basis. *People v. Sikora*, 32 Ill. 2d 260, 267-269, 204 N. E. 2d 768, 772, 773 (1965); *Chicago v. Universal Pub. & Dist. Corp.*, 34 Ill. 2d 250, 252-257, 215 N. E. 2d 251, 252, 254 (1966); *City of Blue Island v. DeVilbiss*, 41 Ill. 2d 135, 140-142, 242 N. E. 2d 761, 763-765 (1968); *City of Chicago v. Geraci*, 46 Ill. 2d 576, 578-584, 264 N. E. 2d 153, 155-158 (1970). A close review of the cases leads only to the conclusion that the Illinois Supreme Court was attempting to interpret decisions of the United States Supreme Court which had also reviewed materials on an ad hoc basis. [e. g. *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958); *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1962); *Central Magazine Sales, Ltd. v. United States*, 389 U. S. 50 (1967); *Potomac News Co. v. United States*, 389 U. S. 47 (1967); *Redrup v. New York*, 386 U. S. 767 (1967); *Rosenbloom v. Virginia*, 388 U. S. 450 (1967), and *Felton v. City of Pensacola*, 390 U. S. 340 (1968).]

In *People v. Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 (1972) (*Ridens I*), certain materials with described con-

tent are found to be obscene, while in *City of Chicago v. Geraci*, 46 Ill. 2d 576, 264 N. E. 2d 153 (1970), similar content in publications is held to be constitutionally protected. The cases are, therefore, limited in application to the specific titled materials mentioned therein. Indeed, three cases cited by the Attorney General involve the review of alleged violations of city ordinances, and provide no authority with respect to a construction of the state obscenity statute, since it is not even drawn in issue by such cases. *Chicago v. Universal Pub. & Dist. Corp.*, 34 Ill. 2d 250, 215 N. E. 2d 251 (1966); *City of Blue Island v. DeVilbiss*, 41 Ill. 2d 135, 242 N. E. 2d 761 (1968); *City of Chicago v. Geraci*, 46 Ill. 2d 576, 264 N. E. 2d 153 (1970).

The Illinois Supreme Court has not engrafted the Miller v. California examples for specificity onto the Illinois obscenity statute.

The appellee contends that the Illinois Supreme Court in *Ridens II* and *People v. Gould*, 60 Ill. 2d 159, 324 N. E. 2d 412 (1975), accepted the examples of specific sexual conduct the depiction of which could lead to a finding of obscenity as set forth in *Miller v. California*. The Illinois Supreme Court in *Ridens II* and in *People v. Gould* stated that while the court accepted the first two parts of the *Miller* tripartite test, that is, parts (a) and (b), the Illinois Supreme Court felt that the statute as written met those standards. The opinions in *Ridens II* and *Gould*, therefore, demonstrate that the Illinois Supreme Court never addressed itself to the need for specificity, as exemplified in the examples of *Miller*.

Indeed, the opinion in *Ridens II* shows that the court never embraced the examples in *Miller*, and was instead directing its attention to (a) and (b) of the tripartite guidelines. The court summarized its holding in *Ridens II* in this manner:

> "Our holding that section 11-20 of the Criminal Code and the Moline obscenity ordinance are construed to incorporate parts (a) and (b) of the *Miller* rather than the *Memoirs* standards may not be applied retroactively if to do so renders their construction less favorable to defendants. (*People v. Patton*, 57 Ill. 2d 43, 48.) In our opinion the changes do not have that effect, and we find no impediment to the retroactive application of the statute and ordinance as now construed."
>
> *People v. Ridens*, 59 Ill. 2d at 374, 375-321 N. E. 2d at 270, 271.

In *Eagle Books, Inc. v. Reinhard*, 418 F. Supp. 345 (three-judge, N. D. Ill., 1976), a federal three-judge court held the Illinois Obscenity Statute unconstitutional for failing to set forth, post-*Miller*, the specific sexual conduct required under the *Miller* standards. That court stated:

> "An incorporation of the *Miller* tripartite standard cannot alone satisfy *Miller's* specificity requirement. *Miller* explicity reserved for the states the specification itself. Not every state will seek to regulate all, or even the same subset of that material which can be constitutionally treated as obscene. Indeed, the Supreme Court of the United States expressly avoided demanding the use of its particular examples as a standard or proposed regulatory scheme. *Ridens II* might have explicitly included the *Miller* examples as its own, by construction, as did the Supreme Court in *Hamling*, but *Ridens II* did not. It remained after *Ridens II* for section 11-20 to be amended either legislatively or by state judicial construction to supply the

wanting specificity so that the nature of the possible obscene materials being regulated, and their distinction from protected materials, could be adequately defined. *That definition is as essential to law enforcement officials who are charged with carrying out the law, as it is to juries* like the one in *Jenkins,* who must apply the law to a set of facts.

"On the three other occasions in which the Illinois Supreme Court had to construe sections 11-20, it chose not to supply the needed specificity. In *People v. Gould,* 60 Ill. 2d 159, 324 N. E. 2d 412 (1975), the tripartite *Miller* standard, and the two possible examples were quoted, just as they were in *Ridens II.* Reference was made to *Ridens II* for the incorporation of the *Miller* tripartite standard, and Justice Davis, dissenting, incorporated by reference his prior dissent in *Ridens II.* In *People v. Hume,* 60 Ill. 2d 397, 327 N. E. 2d 329 (1975), specificity was not explicitly dealt with."

Eagle Books v. Reinhard, 418 F. Supp. at 349, 350. (Court's emphasis.)

The opinion in *Eagle Books* went on to contradict the argument that the Illinois Supreme Court had provided specificity in the Illinois Obscenity Statute with the language of the Illinois Supreme Court's opinion in *People v. Ward,* 63 Ill. 2d 437, 349 N. E. 2d 47 (1976). In the opinion below, the Illinois Supreme Court stated:

> "It was held in *Ridens II* that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the 'prurient interest' a 'shameful or morbid interest in nudity, sex or excretion.' The defendant argues that we erred in *Ridens II* in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in *Ridens II.* It is extremely difficult to define the term 'obscenity' with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objection."
>
> *People v. Ward,* 63 Ill. 2d at 441, 349 N. E. 2d at 49.

This opinion is not the type of specific judicial delineation that *Miller* specificity is directed to (see for example, *State v. Harding,* 114 N. H. 335, 320 A. 2d 646 [1974]) nor is it at all comparable with the *Miller* examples.

CONCLUSION

Considering all of the post-*Miller* opinions of the Illinois Supreme Court, it remains evident that that court feels the general terms employed by the Illinois Obscenity Statute satisfy *Miller's* requirements. The court's opinion below in the instant case leads only to the conclusion that no specificity has been provided nor can it be expected in the future. The Federal Court in *Eagle Books, Inc.* realized the serious impact on freedom of expression and the dissemination of protected material by the statute in its present form in Illinois, and accordingly held the statute unconstitutional. This Court should likewise hold that the Illinois Obscenity Statute, as written and as construed by the Illinois Supreme Court, is violative of the constitutional standards pronounced in *Miller v. California.*

Appellant submits the motion to dismiss or affirm this appeal should be denied.

Respectfully submitted,

DONALD M. RENO, JR. and
J. STEVEN BECKETT

RENO, O'BYRNE & KEPLEY

501 West Church
Champaign, Illinois 61820

Attorneys for Appellant